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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

LAMBERT C. MIMS,
Petitioner,

--against--

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether, under the Hobbs Act, a "quid pro quo" is a requirement of extortion "under color of official right" in cases that do not involve campaign contributions, and, if so, whether the jury must be charged that, to convict, it must find that payments have been made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.

II. Whether a Local Rule of the federal Court of Appeals that provides that unpublished opinions have no precedential effect violates Article III of the United States Constitution.

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The opinion of the United States Court of Appeals for the Eleventh Circuit is unpublished, and is set forth in the appendix at App. 1.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Eleventh Circuit was entered on April 30, 2001. (App. 1) A petition for rehearing and suggestion for rehearing en banc was denied by order entered on July 27, 2001. (App. 3) This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1284.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, § 1, cl. 1, of the United States Constitution, provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The Hobbs Act, 18 U.S.C. § 1951, provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or

imprisoned not more than twenty years, or both.

(b) As used in this section . . .

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Local Rule 36-2 of the Rules of the Eleventh Circuit provides:

> An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which such citation is made.

STATEMENT OF THE CASE

Petitioner Lambert Mims is a former Mayor of the City of Mobile, Alabama, who for twenty years served as a member of the City Commission and as the Public Works Commissioner. In 1989, Mims, who was in the midst of a mayoral election campaign, was charged in three counts of a thirty-five count superseding indictment. In 1990, he was convicted of two counts of violating the Hobbs Act, 18 U.S.C. § 1951. Mims was sentenced (pre-Guidelines) to two ten years terms of imprisonment to be served concurrently.

The relevant facts are as follows:

In the late 1970s and early 1980s, because of skyrocketing oil prices, the City of Mobile was contemplating a

steam generator plant that would convert garbage into steam energy. To be economically feasible, there had to be a purchaser for the steam generated by the plant, and the City and County of Mobile had to provide sufficient solid wastes for use as fuel. (R10-82-85)[1]

In October, 1983, the City publicly announced that it would accept proposals for building and operating a steam plant. (R10-164-65) Gerald Godwin, who had been pursuing a garbage-to-steam proposal for some time, formed Area Services, Inc. ("ASI"), and submitted a proposal that set forth his plan to use Degussa Corporation as the steam purchaser.[2] ASI was a shell corporation – no stock was issued, and it had no bank accounts and no assets other than a non-exclusive, contingent contract to supply steam to Degussa. (R11-422, 454; R12-320-21, 796-97; R13-900-01)

The City received a number of proposals, which were opened on November 7, 1983. Although ASI was the apparent low bidder, an independent professional engineering firm the City had hired to evaluate the steam plant proposals reported that an even better proposal had been submitted by a company called Alabama Energy Recovery, Inc. ("AER") (R15-1633, 1685) AER was owned by a co-defendant in this case, Charles Shaw, a local businessman who had been friends with Commissioner Mims for years and had been awarded other City contracts. (R30-6143)

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[1] The references to "R" are to the record in the earlier appeal of Mims's conviction, which was made part of the record on appeal in this case.

[2] Godwin had sought and obtained an introduction to Commissioner Mims, and the two men began an acquaintance that lasted many years.

The AER proposal set forth a plan to locate a steam plant at Stone Container Corp., which was financially attractive because, unlike Degussa, Stone Container was centrally located within the City of Mobile. As a result, transport costs would be much lower. (R12-890-92; R13-1093-97; R15-1164-67)

In their proposals, both Shaw and Godwin had named the construction company of another co-defendant, Ellis McDonald, as the company that would build the plant. (R12-780)

According to the government, the alleged extortion took place at a meeting on December 8, 1983. At that meeting, according to Godwin, McDonald introduced Godwin to Shaw, and allegedly told both men that if a steam plant was going to be built, he was going to build it. McDonald then advised the two men that they should work out the arrangements. After this "introduction," according to Godwin, Shaw insisted that Godwin transfer to him 50% of ASI. (R11-430-31; R12-791-95) Mims was not present at this meeting and there was no evidence that he was aware of it. As Godwin readily admitted, his name was not even mentioned. (R11-432-35; R14-1238)

Over the next few weeks, Godwin attempted to convince both Shaw and Mims that AER's proposal was not feasible. Mims allowed AER until February 1, 1984 to put the project together. In the meantime, in January, 1984, Godwin transferred an interest in ASI to Shaw. (R11-452-457; R12-632-33)

The crux of the case against Mims rested on Godwin's testimony about a second lunch meeting that took place on either January 30, 1984 or February 2, 1984. Godwin testified that at this luncheon Mims asked both him and Shaw if their business was worked out. Both said that it was. Mims then asked Shaw to send a letter advising the City that Stone Container would not be the steam purchaser and that the contract should go to ASI. (R11-460-61)

Godwin did not testify that Mims ever told him he had to do business with Shaw in order to obtain the contract with the City, or that Shaw ever told him that he had to transfer an interest in ASI in order to secure Mims's approval. Nor did Godwin testify that Mims explicitly promised him anything or that Mims personally obtained anything from Godwin or from anyone else in connection with the steam plant proposal.

On March 2, 1984, the City gave Godwin a letter of intent. (R10-168-69; R11-47) Ultimately, however, the City of Mobile never awarded a contract to any company because oil prices dropped and the proposal for a steam plant was no longer economically desirable. (R10-106-08; R12-629)

In 1993, the Court of Appeals for the Eleventh Circuit, in an unpublished opinion, affirmed Mims's conviction. United States v. McDonald, 12 F.3d 217 (11th Cir. 1993) (sub nom.) (Table, No. 90-7436). Shortly thereafter, the Eleventh Circuit decided United States v. Martinez, 14 F.3d 543 (11th Cir. 1994), holding that a "quid pro quo" is a requirement in all Hobbs Act cases involving extortion "under color of official right." Mims promptly alerted the Court to the importance of that decision to his conviction, but his petition for rehearing and rehearing en banc was denied.

This Court granted a petition for a writ of certiorari on another issue, vacating the judgment and conviction, and remanding for further consideration. Mims v. United States, 513 U.S. 1107 (1995). On remand, Mims again raised the conflict between the decision in his case and the Eleventh Circuit's decision in Martinez, and in United States v. Davis, 30 F.3d 108 (11th Cir. 1994), which reaffirmed that a jury must be instructed on the "quid pro quo" requirement. The Eleventh Circuit again affirmed the conviction, in an unpublished opinion. United States v. McDonald, 79 F.3d 1158 (11th Cir. 1996) (sub nom.) (Table, No. 90-7436). Certiorari was denied. Mims v. United States, 517 U.S. 1246 (1996).

On June 6, 1997, Mims commenced an action, pursuant to 18 U.S.C. § 2255, to vacate and set aside his conviction. On September, 9, 1997, the District Court denied the petition; on December 12, 1997, the District Court denied a motion for reconsideration.

On April 30, 2001, the Eleventh Circuit, again by unpublished opinion, affirmed. Mims sought rehearing, once again specifically raising the conflict between the unpublished opinion in his case and the Eleventh Circuit's published opinions in Martinez and Davis. Mims also challenged the constitutionality of the Eleventh Circuit's rule providing that unpublished opinions have no precedential effect.

On July 27, 2001, Mims's petition for rehearing and rehearing en banc was denied.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT IN THE CIRCUITS OVER WHAT CONSTITUTES EXTORTION "UNDER COLOR OF OFFICIAL RIGHT"

The jury in this case was never told that to convict Mims of extortion "under color of official right" it had to find a "quid pro quo," or, more particularly, that it had to find that Mims obtained property in return for a promise to take or not to take official action. In essence, Mims, who did not ask for or receive any payments from Godwin or anyone else, was convicted of extortion because, according to the government's theory of the case, he helped steer a potential government contract to a friend.

While this case is extreme, the proper reach of the Hobbs Act has plagued the federal courts since the early 1970s, when

the government first began aggressively using the Hobbs Act to attack public corruption at the state and local levels. See generally Ruff, Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy, 65 Geo. L. J. 1171 (1977). This Court has twice addressed the scope of the "official right" prong of the Hobbs Act, but many questions remain unanswered and the Circuit Courts, and, as this case demonstrates, even different Panels within a single Circuit, have decided these questions in conflicting ways.

In McCormick v. United States, 500 U.S. 257 (1991), this Court held that a public official does not commit extortion "under color of official right" when he accepts a campaign contribution unless the government proves an explicit quid pro quo. Receiving a contribution is a crime only "**if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.**" Id. at 272. (Emphasis added)

The following year, in Evans v. United States, 504 U.S. 255 (1992), the Court held that "inducement" is not an element of the crime of extortion "under color of official right." The Court then affirmed the defendant's conviction despite jury instructions that did not incorporate the "explicit promise" language of McCormick, explaining that, "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." Id. at 268.

McCormick and Evans did not resolve whether the "quid pro quo" requirement is an element of "official right" extortion in cases, such as this one, that do not involve campaign contributions. Moreover, Evans raised questions about what the Court meant by the "explicit promise" language employed in

McCormick, and it left open whether the "quid pro quo" requirement is satisfied, even absent an "explicit promise" to perform or refrain from performing an official act, if the jury finds the defendant "knew" a benefit was being extended in exchange for official action. See Yarbrough, The Hobbs Act in the Nineties: Confusion or Clarification of the Quid Pro Quo Standard in Extortion Cases Involving Public Officials, 31 Tulsa L.J. 781 (Summer 1996).

After McCormick and Evans, the lower courts have grappled with how to treat "official right" Hobbs Act cases, particularly those, like Petitioner's, that do not involve campaign contributions. A conflict in the Circuits has developed, and, as this case vividly illustrates, even within a Circuit there is no consistent approach to what a jury must find before it convicts of "official right" extortion.

The Eleventh Circuit, at least until the unpublished decision in this case, has required that, in all "official right" cases the jury be told that it must find an "explicit promise" by the public official. United States v. Martinez 14 F.3d 543 (11th Cir. 1994); United States v. Davis, 967 F.2d 516 (11th Cir. 1992), on rehearing, 30 F.3d 108 (11th Cir. 1994). Indeed, in Davis, decided after Evans, the Court held that "**an explicit promise by a public official to act or not act is an essential element of Hobbs Act extortion, and the defendant is entitled to a reasonably clear jury instruction to that effect.**" 30 F.3d at 108. (Emphasis added)

Other Circuits have disagreed, holding that, at least in non-campaign contribution cases, a "quid pro quo," to the extent it is required, may be implicit – that the jury need not be instructed that it must find an "explicit promise" by the public official. United States v. Giles, 246 F.3d 966 (7th Cir. 2001);

United States v. Bradley, 173 F.3d 225, 231 (3d Cir.), corrected by, 188 F.3d 98 (3d Cir.), cert. denied, 528 U.S. 963 (1999); United States v. Tucker, 133 F.3d 1208 (9th Cir. 1998); United States v. Delano, 55 F.3d 720 (2d Cir. 1991); Hairston v. United States, 46 F.3d 361 (4th Cir.), cert. denied, 516 U.S. 840 (1995). And the Sixth Circuit has held that, even in campaign contribution cases, Evans modifies McCormick, and that the "explicit promise" seemingly required by McCormick can be satisfied by a mere showing of "knowledge." United States v. Blandford, 33 F.3d 685, 696-97 (6th Cir. 1994), cert. denied, 514 U.S. 1095 (1995). See also United States v. Collins, 78 F.3d 1021 (6th Cir.), cert. denied, 519 U.S. 872 (1996) (extending this rule to non-campaign contribution cases).

The confusion over just what is required to convict a defendant of "official act" extortion has created conflict, not only among the Circuits, but within individual Circuits as well. This case makes that clear. In Martinez, the Eleventh Circuit, construing Evans as adopting the "explicit promise" requirement of McCormick, reversed the defendant's conviction because the jury charge did not adequately convey the "quid pro quo" requirement. Id. at 553.[3]

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[3] In Martinez, the jury was instructed:

> Extortion also includes the wrongful acquisition of property from someone else under color of official right.
>
> Extortion under color of official right is the wrongful taking by a public official of money or property not due to him or his office, whether or not the taking was accomplished by force, threats or use of fear. In other words, the wrongful use

The charge in this case was virtually identical to the charge given to the jury in Martinez,[4] as the government frankly

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> of otherwise valid official power, may convert lawful action into extortion.
>
> So, if a public official threatens or agrees to take or withhold official action for the wrongful purpose of inducing a victim to part with property, such action would constitute extortion even though the official was already duty bound to take or withhold the action in question.
>
> Acceptance by an elected official of economic benefits does not in itself constitute a violation of federal law, even though the giver of the benefit has business pending before the official.
>
> However, passive acceptance of a benefit by a public official is sufficient to form the basis of an extortion violation, if the official knows he had been offered the payment in exchange for the exercise of his office power, or that such payment is motivated by hope of influence.

14 F.3d at 552.

[4] Here, the jury was instructed:

> "Extortion" also includes the wrongful acquisition of property from someone else under color of official right.
>
> Extortion "under color of official right" is the wrongful taking by a public officer of money or property not due him or his office, whether or not

acknowledged in its Brief in Opposition to Mims's Petition for a Writ of Certiorari during the direct appeal process, arguing to this Court that "any tension between the Eleventh Circuit's unpublished decision in this case and its later decision in Martinez is for that court to resolve." (Brief in Opposition at 12, n. 5) Yet, in this case, the Eleventh Circuit, without any explanation, and without citation to Martinez, ruled that the instruction in this case "adequately charged the 'Quid Pro Quo' element of the Hobbs Act offense." (Add. 2) Consequently, what is required now in the Eleventh Circuit, in light of this conflict, is far from clear.

Undoubtedly, there will continue to be inconsistent rulings on what is required to prove extortion "under color of official right." Whether McCormick/Evans apply to non-campaign contribution cases, whether the "explicit promise" requirement of McCormick is limited to campaign contribution cases, or whether that requirement, even in campaign contribution cases, survived Evans remain open questions.

> the taking was accomplished by force, threats, or use of fear. The wrongful use of otherwise valid official power may convert lawful action into unlawful extortion. So, if a public official misuses his office by threatening to take or withhold official action for the wrongful purpose of inducing a victim to part with property, such a threat would constitute extortion even through [sic] the official was already duty bound to take or withhold the action in questions.
>
> "Wrongful" means to obtain property unfairly and unjustly by one having no lawful claim to it.

The elements of this extraordinarily important and far-reaching federal criminal statute should not depend on the jurisdiction or on the particular Panel that hears a particular appeal within a jurisdiction. This Court should grant review in this case to resolve the conflict and finally decide what the government must prove in "official right" Hobbs Act cases.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE THE IMPORTANT QUESTION OF WHETHER CIRCUIT COURT RULES THAT LIMIT THE PRECEDENTIAL EFFECT OF UNPUBLISHED OPINIONS VIOLATE ARTICLE III OF THE CONSTITUTION

Virtually every federal Court of Appeals has some rule addressing unpublished opinions. The rules vary, although most, in one form or another, deprive unpublished opinions of precedential effect, or, at a minimum, afford them "disfavored" status. See D.C. Cir. LR 28(c); First Circuit LR 36.2(6); Third Circuit IOP 5.3; Fourth Circuit LR 36(c); Fifth Circuit LR 47.5.3 et seq.; Sixth Circuit LR 28(g); Seventh Circuit LR 53(b); Eighth Circuit LR 28A(i); Ninth Circuit LR 36-1 et seq.; Tenth Circuit LR 36-3(A); Eleventh Circuit LR 36-2; Fed. Cir. LR 47.6(b).

A rule that deprives unpublished opinions of precedential effect encourages opinions that contain little or no reasoning, and that may be, or may appear to be, in conflict with published opinions. This, in turn, creates the appearance, if not the reality, of a dual system of laws: published opinions that supposedly have precedential effect and purport to provide a governing body of law, and unpublished opinions, an "underground" and often "secret" body of laws, that apply only to the litigants involved in the unpublished opinion. Litigants seeking appellate review may

well question which set of laws will apply to them.

Moreover, a rule that deprives unpublished opinions of precedential effect may also create a "shadow body of law." Unpublished opinions, as a practical matter, are unavailable to many litigants. Some litigants and some judges, however, will have access to those opinions and they may become a powerful indicator of how a Court, in practical terms, is treating a particular precedent, and may influence future decisions of the Court. Yet some litigants before the Court may be unaware of the existence of this anonymous body of law. See, e g., Carpenter, The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?, 50 S.C.L. Rev. 235 (1998).

This case illustrates this problem. The opinion of the Eleventh Circuit in this case (and, in all of the prior opinions rendered in this case) is stamped with the directive, "Do Not Publish."[5] As a result, the decision in the case, upholding a jury instruction virtually identical to the instruction struck down in Martinez, is technically unavailable to litigants. Nevertheless, some prosecutors and some District Court judges will know of

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[5] Local Rule 36-2 of the Rules of the Eleventh Circuit provides:

> An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which such citation is made.

the decision and may rely on it in formulating jury instructions under the Hobbs Act. Others may not be aware of the decision. Consequently, it is unclear whether the rule announced in Martinez and Davis requiring that a jury be instructed that it must find an "explicit promise" will be followed by some judges, or whether some judges will view the unpublished decision in this case as modifying the Martinez/Davis rule, or whether, for some reason, Mims alone will not be entitled to the benefit of the Martinez/Davis rule.

Recently, a panel of the Eighth Circuit, in an opinion written by Justice Richard Arnold, after conducting a searching examination of its own similar "not for publication" rule, and of the history of the "doctrine of precedent," concluded that requiring adherence to precedent was essential to the separation of legislative and judicial power, and that a rule that limits the precedential effect of judicial opinions violates Article III of the Constitution. Anastasoff v. United States, 223 F.3d 898 (8th Cir.), vacated on rehearing en banc on other grounds, 235 F.3d 1054 (8th Cir. 2000). Rehearing en banc was granted to address the continuing validity of the unpublished opinion that was involved in the merits of the case. Although the decision was vacated as moot, with a note that the constitutionality of the Eighth Circuit Local Rule remained an open question, 235 F.3d at 1056, Judge Arnold's scholarly opinion remains persuasive. See Williams v. Dallas Area Rapid Transit, 256 F.3d 260 (5th Cir. 2001) (Smith, J., Jones, J., and DeMoss, J., dissenting from denial of petition for rehearing en banc) (arguing for en banc consideration of constitutionality of no citation rule). See also Price, Precedent and Judicial Power After the Founding, 42 B.C.L. Rev. 81 (2000); Merritt & Brudney, Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals, 54 Vand. L. Rev. 71 (2001) But see Hart v. Massanari, 2001 WL 1111647 (9th Cir. 2001) (rejecting reasoning of

Anastasoff).

Unpublished opinions now account for nearly 80% of all dispositions on the merits in the Courts of Appeals, with wide variations in publication rates among the Circuits, and even among different Judges. Merritt & Brudney, supra, at 72, 112-113. The proliferation of unpublished opinions may well be an unavoidable consequence of an overburdened judiciary. But, as Justice Arnold observed in the panel decision in Anastasoff, whether or not an opinion is published should not be determinative of whether or not it is to be given precedential effect.

We urge this Court to take this opportunity to grant review to address the very important and much debated question of whether local rules that limit the precedential effect of unpublished opinions comport with the doctrine of separation of powers and with Article III of the Constitution.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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